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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al.,

Appellants,

vs.

RICHARD W. RILEY, Governor of the State of South Carolina, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM OR DISMISS

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IN THE SUPREME COURT OF THE UNITED STATES
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SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al.,

Appellants,

vs.

HONORABLE RICHARD W. RILEY, Governor of the State of South Carolina, et al.,

Appellees.

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16.1(a), (c) and (d) of the Rules of the Supreme Court of the United States, the appellees Richard W. Riley, Ramon Schwartz, Jr., Robert J. Sheheen, and James B. Ellisor move the Court to affirm the judgment of the three-judge United States District Court for the District of South Carolina, or, in the alternative, to dismiss the appeal on the grounds that it is manifest that the question on which the decision of the

cause depends is so unsubstantial as not to need further argument, that the appeal was not taken within the time prescribed by the laws of the United States and the rules of this Court, that the case was not docketed within the time prescribed by the rules of this Court, and that the question presented on appeal is not raised or treated in the decree designated in the notice of appeal.

QUESTION PRESENTED ON APPEAL

Whether a congressional redistricting plan, which is a modification of a plan approved by one house of a bicameral state legislative body, ordered to be implemented by a three-judge United States District Court subsequent to the failure of the State to enact a plan must receive pre-clearance pursuant to Section 5 of the Voting Rights Act?

OPINIONS BELOW

The orders of the three-judge United

States District Court for the District of South Carolina, which were entered on March 9, May 7 and June 2, 1982, respectively, are set forth in appellants' jurisdictional statement. See, Jurisdictional Statement, App. A, B, and C.

JURISDICTION

The grounds on which the appellants assert jurisdiction is based are adequately set forth in the appellants' jurisdictional statement. See, Jurisdictional Statement at 2-3. The appellees contend that the Court is without jurisdiction in that the appellants have not taken an appeal in time from the order entered on June 2, 1982. See, Motion to Affirm, etc., at 9-10.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 5 of the Voting Rights Act of 1965, as amended [42 United States Code, § 1973c], and the Fourteenth and Fifteenth

Amendments of the United States Constitution are referred to in the appellants' jurisdictional statement. See, Jurisdictional Statement, at 3.

STATEMENT OF CASE

The appeal herein, according to the appellants' jurisdictional statement at page 1, is taken from the order of the three-judge United States District Court for the District of South Carolina [Clement F. Haynsworth, Senior United States Circuit Judge, Donald Russell, United States Circuit Judge, and Charles E. Simons, Jr., Chief Judge for the District of South Carolina] entered on June 2, 1982. See, Jurisdictional Statement, App. C at 16a-18a. The order concluded that the congressional redistricting plan previously ordered into effect by the three-judge court in a decree entered on May 7, 1982, which the appellants had

moved to enjoin from implementation, was a "court-ordered" plan and, therefore, not subject to the preclearance provisions of Section 5 of the Voting Rights Act. Id.

The appellants, who were plaintiffs below, commenced this action on October 14, 1981 by the filing of a summons and complaint with the United States District Court for the District of South Carolina. The complaint alleged, among other claims, that the failure of the South Carolina General Assembly to enact a congressional redistricting plan for the six congressional seats allotted South Carolina based upon the 1980 census data violated Article I, Section 2 of the United States Constitution. In the prayer for relief, the court was requested to devise a redistricting plan.

The appellants action was consolidated with a similar action brought by different plaintiffs, who have not appealed. Both

actions were heard by the district court on February 11, 1982.

For many months, the South Carolina Senate and House of Representatives attempted, without success, to enact a congressional redistricting plan based on the 1980 census data. Id., App. A at 2a. Due to irreconcilable differences between the Senate and House, efforts by the General Assembly to enact a redistricting plan proved unsuccessful. Id., App. A at 2a and C at 17a. Several redistricting plans were thereafter submitted to the court by the various plaintiffs, including the appellants herein. Appellees Nancy Stevenson, as the Lieutenant Governor and Presiding Officer of the Senate, and L. Marion Gressette, as the President Pro-Tempore of the Senate and Chairman of the Senate Judiciary Committee, who were defendants below, did not urge the district court to adopt any particular plan, but suggested that it

adhere to State law and policies in arriving at a redistricting plan, especially the policy of adhering to county boundary lines. Appellees Ramon Schwartz, Jr., the Speaker of the South Carolina House, and Robert J. Sheheen, the Chairman of the House Judiciary Committee,[1] endorsed a House-passed 0.28% plan.[2] Id., App. A at 3a-4a, 8a-11a.

On March 9, 1982, the district court entered its per curiam order in the consolidated action. It acknowledged that all parties agreed that because of population

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[1] Appellees Richard W. Riley, as Governor of the State of South Carolina, and James Ellisor, as Executive Director of the State Election Commission did not take a position as to what remedy the court should impose.

[2] The Senate never approved the 0.28% plan. See, Jurisdictional Statement, App. A at 17a.

changes between 1970 and 1980, the court had to adopt a new congressional redistricting plan for South Carolina, and even though the court at first approved a redistricting plan favored by the House, the 0.28% plan, that precise plan never gained final acceptance. Id. at 11a-12a. Instead, the court two months after its initial decree, directed in an order entered on May 7, 1982, that the 0.28% plan be modified. Id., App. B at 13a-15a. It ordered that the line that separated Berkeley County into the First and Sixth Congressional Districts be redrawn. Id. With that change, a number of people were shifted from one congressional district to another and the total population variance increased from 0.28% to 0.295%. Id. Neither house of the South Carolina General Assembly has yet adopted the court-devised 0.295% plan.

The appellants' notice of appeal was filed with the United States District Court

for the District of South Carolina on May 27, 1982. Id., App. D at 19a. This notice states that the appellants appeal from "the final judgment entered on May 7, 1982, redistricting the congressional districts in the State of South Carolina." Id., at 22a. It is understood that the instant appeal was docketed with the Court on or after October 1, 1982.

REASONS FOR GRANTING MOTION

The appellants declare in their jurisdictional statement that they are appealing from the order entered by the district court on June 2, 1982, but no notice of appeal has been filed with respect to that order. Id., at 1, App. D 19a-23a. 28 U.S.C. § 2101; Rule 11.2, supra. The only notice which they presented was filed prior to the entry of the aforementioned order and designates the judgment entered on May 7, 1982, as the

subject of the appeal. Because the appellants have not filed a notice of appeal from the order entered on June 2, 1982, the appeal should be dismissed. Taggart v. New York, 392 U.S. 667 (1968) [per curiam]; Hill v. Chicago and Evanston Railroad Company, 140 U.S. 52 (1891); Credit Company, Ltd. v. Arkansas Central Railway Company, 128 U.S. 258 (1888); Rule 11.3, .4, supra; cf., Gunther v. E.I. DuPont De Nemours and Company, 255 F.2d 710, 717-718 (4th Cir., 1958). Similarly, the appeal should be dismissed in that the sole question presented in the jurisdictional statement was not raised or treated in the order designated in the notice of appeal or the preceding order of March 9, 1982. See, Jurisdictional Statement at 3, App. A, B and D at 22A. Rule 10.2; cf., Martinez v. California, 444 U.S. 277, 281 n. 4 (1980); Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 432

n. 12 (1963); Gunther v. E.I. DuPont De Nemours and Company, supra. As indicated in the jurisdictional statement at page 5, the question was not even raised by the appellants until after the entry of the order of May 7, 1982.

The instant appeal was not docketed within the time prescribed by Rule 12.1, supra, or in the extended time set by the Chief Justice in his order dated August 3, 1982. The attempt by the appellants to file a jurisdictional statement which did not conform with Rules 15 and 33, supra, prior to expiration of the extended period could not have effected the docketing of the appeal. Rule 15.2, supra. The appeal, therefore, should be dismissed for the appellants' failure to docket the appeal within the appropriate times. Pittsburg Towing Company v. Mississippi Valley Barge Line Co., 385 U.S. 32, rehearing denied 385 U.S. 995 (1966).

In Connor v. Johnson, 402 U.S. 690, (1971), this Court held that a court-ordered reapportionment plan which has not been adopted by the legislature is not subject to the preclearance requirements of Section 5 of the Voting Rights Act [42 U.S.C. § 1973c]. Cf., Conner v. Waller, 421 U.S. 656 (1975). The preclearance requirements of the Voting Rights Act are applicable only "whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people." McDaniel v. Sanchez, 452 U.S. 130 at 153 (1981).

There is no contention made here that the congressional redistricting plan which the district court ordered implemented in the State of South Carolina was ever adopted by the South Carolina General Assembly. Cf., Jurisdictional Statement, App. C at 16a-18a. The 0.295% plan is a

court-fashioned plan and nothing more. No litigant originally conceived it or urged its adoption by the district court. Cf., McDaniel v. Sanchez, supra at 149. And simply because the 0.295% plan is a modification of the 0.28% plan submitted by the House defendants does not make the 0.295% plan any less a plan fashioned by the court. The 0.295% plan came into being only because the district court, unsatisfied with the location of the line in the 0.28% plan that divided Berkeley County [see, Jurisdictional Statement, App. A at 11a-12a], "directed the parties and counsel to redraw the line dividing Berkeley County so as to make it run along precinct lines." Id., App. B at 13a-15a.

The appellants complain, however, that the "court-ordered modifications" in the 0.28% plan that brought about the formulation of the 0.295% plan were "only minor." Id. at 5-6. But any redistricting

plan is necessarily a modification of any other. Every congressional districting plan will differ from another to some degree. While the differences between the 0.28% plan and the 0.295% plan are admittedly small, they are meaningful still. The total population variances differ, 432 people are shifted about, the dividing line in Berkeley County is differently located, and a number of voting precincts are differently affected. Cf., McDaniel v. Sanchez, supra at 135, n. 9. Any one of those factors could well have had legislative significance and prompted debate within the General Assembly. And although the differences between the two plans may be small, there is at least one important difference between them: the 0.28% plan was passed by the House; the 0.295% plan was not.

Even if the 0.295% plan were considered to be the same plan submitted by the House defendants, it was not a plan presented

to the district court by a "covered jurisdiction." Here, the "covered jurisdiction" is the State of South Carolina, not the South Carolina House of Representatives. In South Carolina, the people are governed by a legislature with two houses; and a proposal submitted by only one of them is not the proposal of the State itself.

Furthermore, the court-conceived 0.295% plan clearly does not reflect "the policy choices of the elected representatives of the people." To the extent that the 0.295% plan is considered to be the same plan that the House defendants submitted, it may be said to reflect the policy choices of that one chamber only. The Senate flatly rejected the 0.28% plan. See, Jurisdictional Statement, App. C at 17a. For one thing, it crossed county lines. Id. The 0.28% plan, therefore, cannot be said to reflect the policy

choices of the South Carolina General Assembly as a whole; neither, then, of course, can the 0.295% plan.

As noted by the district court, the 0.295% "plan imposed by the Court was never adopted by the South Carolina legislature." Id at 17a. That fact sharply distinguishes the instant case from McDaniel v. Sanchez, supra at 135, where the County Commissioners Court "officially adopted" a reapportionment plan which it submitted to the Court.[3/] In short, McDaniel does not in any way lend support to the appellants' assertion that preclearance is required here. There is simply no authority for the proposition that a court-ordered reapportionment plan,

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[3/] This case also differs from Hughley v. Adams, 667 F.2d 25 (11th Cir., 1982) where a defendant school board designed the redistricting plan which the district court adopted for the election of school board members.

particularly one which differs from any plan submitted to the court by a party to the litigation, must be submitted to the Justice Department for Section 5 pre-clearance when the plan was not submitted by a "covered jurisdiction" and does not reflect the policy choices of the elected representatives of the people.

The appellants based the substantiality of the question herein on their position that the district court's order holding that preclearance is unnecessary in this instance poses a threat to the continued viability of Section 5. That fear is unfounded because the district court's order falls within the exemption recognized by this Court in Conner v. Johnson, supra, for court-ordered plans and spelled out in Regulation 51.16 of the Procedures for the Administration of Section 5 of the Voting Rights Act of

1965.[4/] The district court's order poses no more of a threat to Section 5 than did the district court's order in Connor.

Finally, even assuming the appellants are correct and that Section 5 preclearance of the Court's plan is required, an injunction against the November 2, 1982, congressional elections would be unwarranted at this late date. This Court has repeatedly held or recognized that elections may be held even in the face of Section 5 objections by the Attorney General, provided the plan is recognized as temporary. Georgia v. United States, 411 U.S. 526 (1973); Perkins v. Matthews, 400 U.S. 379 (1971); see also, Horry County v. United States, 449 F.Supp. 990 (D.D.C. 1978);

[4/] 28 C.F.R. 51.16 provides in part:

> Changes affecting voting that are specifically ordered by a Federal Court ... are not subject to the preclearance requirement of Section 5. ...

Terrazas v. Clements, 537 F.Supp. 514 (N.D.Tex. 1982). This Court recently has even permitted the temporary implementation of a plan which a district court lacked authority to make. Upham v. Seamon, 71 L.Ed2d 725 (1982). If elections may be held pursuant to a demonstrably objectionable or invalid plan, then a fortiori they should be permitted when the plan has not been precleared and hence is not known to be necessarily objectionable.

CONCLUSION

The aforementioned appellees respectfully submit that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and, therefore, respectfully move this Court to affirm the judgment entered in the cause by the three-judge District Court for the District of South Carolina or, in the alternative, to dismiss the

appeal as not being taken in time, as not being docketed in time, and as presenting for review a question not raised or treated in the decree which is designated in the notice of appeal. In any event, no injunction should issue enjoining the upcoming congressional elections.

Respectfully submitted,

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